IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	**DEATH PENALTY**
	)	
PETER SAKARIAS,	)	**CASE NO. S102401**
	)	
In re	)	Related to Cases:
	)	Direct Appeal No. S020161
TAUNO WAIDLA,	)	Habeas Corpus No: S076438
	)	
Petitioners,	)	[Los Angeles Superior Court
	)	Case No. A711340]
	)	
On Habeas	)	
Corpus	)	

PETITIONER TAUNO WAIDLA'S INFORMAL REPLY BRIEF

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PETITIONER TAUNO WAIDLA'S INFORMAL REPLY BRIEF

I. THE PROSECUTOR WHO MANIPULATES EVIDENCE DOES NOT DESERVE THE BENEFIT OF THE DOUBT

The State argues the prosecutor was entitled to argue factually inconsistent theories at two trials if the evidence was ambiguous and he truly did not know which defendant struck the "death blow." (Reply to Petitioner's Brief on the Merits (hereinafter "Resp. Reply") at pp. 6, 8, 21.) The State stresses ultimately the jury, not the prosecutor, must decide the facts. (Resp. Reply at pp. 7, 11.) The

State urges the court to give the prosecutor the benefit of the doubt because he did not actually witness the murder and therefore did not know the truth. (Resp. Reply at pp. 24-26.)

Perhaps a prosecutor who simply puts on two consistent cases and then lets the juries hash out the facts deserves the benefit of the doubt. However, nothing like that happened here. The prosecutor did not simply present all the evidence of both defendants' participation in the murder at each trial and ask each jury to draw its own conclusion about who killed the victim. The prosecutor affirmatively manipulated evidence and witnesses at the two trials, advanced inconsistent versions of who actually killed the victim and then exploited those inconsistent versions to argue that each defendant deserved the death penalty because he was the actual killer.

At the Waidla trial, the prosecutor introduced the coroner's testimony about the post-mortem sacral bruise and photos of the corpse to prove that Waidla killed the victim in the living room. (Reporter's Transcript of Tauno Waidla murder trial (hereinafter "Waidla RT") at pp. 1631-1633.) He used this evidence to argue that

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Waidla inflicted the "death blow"[1] in the living room. (Waidla RT at pp. 1631-

1633.) Worse yet, the prosecutor invented a false factual scenario in which Waidla bludgeoned the victim and then "turned the blade" to strike the fatal chop wound to the victim's head. (Waidla RT at pp. 2837, 3069-3070.)

The prosecutor knew his account of Waidla "turning the blade" was contradicted by both defendants' taped statements. Waidla said he hit the victim with the blunt edge of the hatchet. Sakarias said he inflicted the chopping wounds to the victim's head in the bedroom. The prosecutor knew all of this before Waidla's trial because he discussed both defendants' statements and the "Aranda motion" in a pretrial conference prior to the Waidla trial. (Waidla RT at pp. 31-71.) Despite knowledge of the falsity of his version of the murder, the prosecutor argued Waidla "turned the blade" and killed the victim in the living room; he used this false scenario as a basis to argue for the death penalty. (Waidla RT at pp. 3069-3070.) This is manipulative.

At the Sakarias trial, the same prosecutor intentionally refrained from introducing the coroner's testimony about the post-mortem bruise. (Referee's Report on Proceeding, Evidence, and Findings of Fact (hereinafter referred to as "Report") at p. 2.) He intentionally eliminated photos of the so-called post-mortem sacral bruise. (Report at p. 2.) The prosecutor introduced Sakarias's taped confession in which Sakarias admitted to inflicting the hatchet wounds to the victim's head in the bedroom. (Reporter's Transcript of Peter Sakarias murder trial (hereinafter "Sakarias RT") at pp. 1274-1288.) The prosecutor then argued that

Sakarias deserved the death penalty because he actually killed the victim in the bedroom. (Sakarias RT at p. 2436.) The prosecutor never notified Waidla's trial counsel that he changed versions and was now arguing that Sakarias actually killed the victim. This is also manipulative.

Given the above, it is unfair to characterize the issue as whether in the face of ambiguous evidence, a prosecutor should be permitted to ask the jury to decide a difficult factual question that he himself cannot decide. If the prosecutor was genuinely grappling with who actually killed the victim, why would he not just present all the evidence to each jury and simply ask each jury to make a decision based on a full, consistent evidentiary presentation?

The prosecutor did just the opposite. Rather than acknowledging an ambiguity, the prosecutor carefully created the misimpression that there was no ambiguity about who actually killed the victim. In the Waidla trial, Waidla actually killed the victim. (Waidla RT at pp. 2837, 2840, 2842, 3069-3070.) In the Sakarias trial, Sakarias actually killed the victim. (Sakarias RT at pp. 1497, 1520-1522.)

The State correctly argues that separate trials of two co-defendants need not be mirror images of each other. (See Haynes v. Cupp (9th Cir. 1987) 827 F.2d 435.) In Haynes, the Ninth Circuit rejected a claim of prosecutorial misconduct based on "inconsistent theories." The court noted: "It is true that the trials differed in emphasis. However, the underlying theory of the case that all three

defendants were equally culpable, remained consistent." (Id. at p. 439.) The State's reply brief stresses, "in both trials the prosecutor compared Sakarias and Waidla to a person's right and left hand that work together to accomplish a goal." (Resp. Reply at p. 1.) However, the State's reliance on Haynes is misplaced because there is no overall "consistency" in these two cases. Arguing both Waidla and Sakarias participated in the crime does not change the fact that the prosecutor intentionally changed who actually killed the victim. The prosecutor this factor in each defendant's trial and argued the jury should impose death because the defendant himself brutally killed the victim. (Waidla RT at pp. 3069-3070.) This was an intentional, fundamental change, not a more difference in "emphasis."

Even the State's own authorities suggest that the prosecutor's intentional manipulation of evidence changes everything. In Shaw v. Terhune (9th Cir. 2003) 353 F.3d 697, the Ninth Circuit criticized the use of inconsistent theories, but affirmed the conviction. However, the panel noted there is a difference between arguing a factual question based on ambiguous evidence and actively manipulating evidence to lead to inconsistent verdicts. The court noted, "the prosecutor in Thompson did not merely suggest varying interpretations of ambiguous evidence; he manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he used to obtain a conviction and death sentence at Thompson's trial." (Id at p. 702; citing to Thompson v. Calderon

(9th Cir. 1997) 120 F.3d 1045 (en banc) vacated on other grounds, (1998) 523 U.S. 538, 118 S.Ct. 1489.)

The State's brief suggests there is a dearth of authority condemning a prosecutor's pursuit of inconsistent theories. (Resp. Reply at p. 6, 8-9, 21-24.) However, a recent federal case canvassing the circuits reveals wide condemnation of the practice. (See Stumpf v. Mitchell (6th Cir. April 28, 2004) No. 01-3613, 2004 WL 894991.) In Stumpf, the prosecutor argued inconsistent theories at two capital trials. At the first trial, Stumpf pleaded guilty to murder, but the case proceeded to a penalty pause trial. At the penalty trial, the prosecutor argued that Stumpf actually shot and killed the victim and that he deserved the death penalty because he was the actual killer. A three-judge panel found that Stumpf was the principal and sentenced him to death. At a second capital trial, the same prosecutor argued that the co-defendant, Wesley, actually shot and killed the victim. The jury convicted Wesley, but recommended 20 years to life rather than the death penalty. Stumpf petitioned for habeas relief, alleging that the prosecutor's inconsistent theories about who actually killed the victim violated due process. The Sixth Circuit agreed, writing:

> Drawing on the principle that the Constitution's "overriding concern is with the justice of the finding of guilt," United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), several of our sister circuits have found, or

> implied, that the use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the due process clause. See, e.g., Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000); Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (en banc) vacated on other grounds, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring); cf., Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) (involving a situation where both defendants had shot at the victim and it was unclear whose bullet had actually hit and killed the victim; the court found that the two theories advanced by the prosecution were not inconsistent because both defendants could have been convicted under the law of parties). On this issue of first impression in this court, we now join our sister circuits in finding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation.

(Id. at p. 13.)

The prosecutor who selectively presents evidence and testimony at two different trials in order to obtain inconsistent verdicts should not be able to hide

behind deference to the jury's fact-finding function. The jury in the Waidla trial did not know what the prosecutor certainly did know: he was intentionally manipulating the evidence and testimony about who was the actual killer in two different trials.

The State argues that the intentional pursuit of inconsistent theories is not enough to violate due process; instead, there must be some additional showing of "bad faith" that exceeds a showing of intentional conduct. (Resp. Reply at pp. 9, 22-24.) It is hard to divine what this additional showing of "bad faith" would be, and the State does not provide any concrete examples. No California authorities have ever endorsed the State's argument that bad faith encompasses a state-of-mind beyond intentional pursuit of fundamentally inconsistent theories in order to gain a litigation advantage. In fact, the California courts' use of bad faith is entirely consistent with intentional misconduct designed to gain a litigation advantage.

It is also important to note that the hallmark cases discussing due process violations do not require a showing of "bad faith." (See Brady v. Maryland (1963) 373 U.S. 83, 83 S.Ct 1194 [suppression of material exculpatory evidence violates due process regardless of bad faith]; Napue v. Illinois (1959) 360 U.S. 264, 79 S.Ct. 1173 [presentation of material false evidence violates due process if prosecutor knew or should have known of the falsity.]

In Arizona v. Youngblood (1988) 488 U.S. 51, 109 S.Ct. 333, the United States Supreme Court did require a criminal defendant to show that state authorities destroyed potentially exculpable evidence in bad faith. The Court stated that one consideration in determining bad faith was whether the state actors "intentionally" destroyed evidence "to gain some tactical advantage over appellees or to harass them." (Id. 488 U.S. at p. 57.) (See also, United States v. Marion (1971) 404 U.S. 307, 324, 92 S.Ct. 455 [noting that one relevant factor to finding a due process violation is whether "the delay was an intentional device to gain a tactical advantage over the accused."].)

In this case the referee has already found that the prosecutor intentionally advanced inconsistent evidence and theories to gain a litigation advantage. (Report at p. 2.) This appears to be bad faith under Youngblood, which imposes the greatest burden on a criminal defendant seeking to establish a due process violation. If the prosecutor's conduct would constitute bad faith under Youngblood, it should constitute bad faith in this case.

II. THE HABEAS RECORD AS A WHOLE REVEALS USE OF FALSE EVIDENCE

The State argues the prosecutor should be permitted to intentionally offer inconsistent theories at two trials because neither defendant can specifically identify "false evidence" at his trial. (Resp. Reply, at pp. 4, 21.)

The State's own arguments throughout this consolidated habeas litigation strongly suggest the use of false evidence. Even the briefs filed with this Court employ inherently inconsistent arguments. To defend the prosecutor's tactics in the Waidla trial, the State argues that Dr. Ribe's testimony about the post-mortem abrasion was correct and that the victim actually died at Waidla's hands in the living room. (Resp. Reply at pp. 21, 25.) To defend the same prosecutor's tactics in the Sakarias trial, the State implicitly argues Dr. Ribe's prior testimony was incorrect and that the other forensic evidence showed that the victim was still alive when Sakarias dragged her into the bedroom and killed her there. (Resp. Reply at pp. 4-6.) The State also points to Sakarias's taped confession that he hatcheted the victim's head in the bedroom, a fact which the prosecutor certainly knew before the Waidla trial.

The State does not just advance inconsistent arguments in the habeas cases; it actually resorts to offering changed testimony from Dr. Ribe. In 1990, the State offered Dr. Ribe's testimony at the Waidla trial to show that the post-mortem sacral bruise was caused by dragging the victim's dead body across the living room. (Waidla RT at p. 2843.) In 2001, the State filed Dr. Ribe's declaration in the companion case, In re Sakarias. (Return to Sakarias Petition, Exhibit B.) The

declaration calls into question the truthfulness of Dr. Ribe's testimony in the Waidla trial. Dr. Ribe declares, "The abrasion could have been caused by a dragging of the body. The fact that the abrasion does not have striations or vertical scrape marks makes it less likely that the abrasion resulted from dragging of the body, but such a mechanism remains possible." (Id.) The import of this new declaration is to cast doubt on Dr. Ribe's prior testimony. Thus, the same witness who previously testified that the post-mortem sacral bruise proved Waidla actually killed the victim is used to disprove that Waidla actually killed the victim[2]. This betrays use of false evidence.

The Court should be loathe to ignore prosecutorial misconduct because the petitioners cannot prove with certainty which of the two cases was tainted by false evidence. Reading the record of the two state trial reveals inconsistent, irreconcilable theories about who actually killed the victim. One version certainly must be false. The State should not be able to turn its own misconduct and the ambiguity which arises from that misconduct into a basis for denying habeas relief. To hold otherwise would encourage other prosecutors to pursue inconsistent, irreconcilable theories in two trials.

III. THE STATE AND THE AMICUS IGNORE THE PROSECUTOR'S ETHICAL DUTIES TO SEEK TRUTH AND JUSTICE

A public prosecutor is entrusted with enormous responsibility and power. Here the prosecutor was entrusted with the power and responsibility to argue for the death of two young men. The State appears to lightly shrug off these duties, as if advocates in trial are expected to engage in such gamesmanship. Waidla respectfully disagrees with this cavalier view of a prosecutor intentionally pursuing inconsistent theories in two death penalty trials.

The prosecutor is like no other lawyer in the courtroom. (See People v. Kelley (1977) 75 Cal.App. 3d 672, 142 Cal. Rptr. 457.) In Kelley, the State complained the prosecutor accused of misconduct was subject to a "double standard" because she had to meet ethical standards that other lawyers did not. (Id. at p. 688.) The panel sympathized, but explained:

> Nevertheless, it is true that a public prosecutor, as representative of the People, must satisfy additional standards of conduct by reason of his position as the officer who possesses the power and authority to to speak for the state. In practical effect, the public prosecutor functions in a dual capacity - as both agent and principal, as both attorney and client. Because he exercises a dual function, the prosecutor possesses additional responsibilities and becomes subject to broader duties than does defense

> counsel, who only exercises the one function of agent-attorney. Thus a prosecutor is required to meet standards of candor and partiality not demanded of defense counsel.

(Id. at pp. 688-689.)

Waidla's Exceptions to Referee's Report and Brief on the Merits (hereinafter "Pet. Brief") identified numerous ethical violations that occur when a public prosecutor intentionally argues fundamentally inconsistent theories in two capital trials. (Pet. Brief at pp. 10-12) The State's reply brief does not even mention or discuss the ethical implications of the prosecutor's misconduct. The amicus brief also ignores prosecutorial ethics. This is not happenstance.

The prosecutor's conduct is clearly unethical under California law. Rule 5-200 of the Rules of Professional Responsibility states, "in presenting a matter to a tribunal a member. . . (B) shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

The State myopically focuses on "false evidence," but the California Rules of Professional Responsibility and the cases are not so restrictive. Rule 5-200 does not limit itself to "false evidence." The rule prohibits lawyers from "misleading" the court through "artifice" and false statements. The use of "artifice" is telling because artifice encompasses far more than the strict use of false evidence. The common meaning of artifice is "an ingenious expedient, a manouevre, stratagem, device, contrivance, trick." (Oxford English Dictionary, 2nd Ed. 1989.) The

prosecutor who has misled the court commits an ethical violation even if his conduct falls short of knowing use of false evidence. As the court in Kelley wrote:

> (T)he prosecutor has tremendous freedom to rationally evaluate the merits of any accusation he brings and pursue it accordingly. But with greater freedom comes greater responsibility. A prosecutor cannot keep his dual functions wholly separate, and to some extent he always remains the officer who acts for the State - even though in a given instance he may be merely arguing in his capacity as counsel. Accordingly, imposition of a broader standard of conduct on the prosecutor than on defense counsel is justified by the different functions these attorneys perform, in that while they both function as attorneys and agents, the prosecutor exercises the sovereign power of the state as principal.

(Id. at p. 690.)

The State's indifferent attitude towards the prosecutor's ethical lapses in these two death penalty cases is disturbing. The prosecutor's conduct is inconsistent with the high ethical standards contemplated by the ethical rules and the cases discussing those rules.

The United States Supreme Court has stressed that "heightened reliability" is required in all death penalty cases. (See Caldwell v. Mississippi (1985) 472 U.S. 320, 105 S.Ct. 2633.) The gamesmanship employed by the prosecutor in these two cases destroyed any sense of heightened reliability. The prosecutor's pursuit of fundamentally inconsistent theories about who actually killed the victim and who deserved to die on that basis renders both death verdicts unreliable.

This is particularly true in Waidla's case. Neither side put on any evidence at penalty phase. (Waidla RT at p. 3056.) Yet, the jury in Waidla's case deliberated eight full court-days before returning a death verdict. (Waidla RT at pp. 3102-3124.) At one point, the jury announced it was "deadlocked." (Waidla RT at p. 3109.) Any false or misleading argument that Waidla actually killed the victim probably affected the penalty verdict. In such a hotly deliberated case, the Court should give the defendant on trial for his life the benefit of the doubt.

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IV. CONCLUSION

For all the foregoing reasons, the court should grant the petition

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: June 2, 2004

By_____
SEAN K. KENNEDY
Deputy Federal Public Defender

PROOF OF SERVICE

I, Mariza Vergara, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202, Telephone No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled above; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **PETITIONER TAUNO WAIDLA'S INFORMAL REPLY BRIEF** on the following individual(s) by placing same in a sealed envelope for collection and mailing via the United States Post Office, addressed as follows:

Michael Keller
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This proof of service is executed at Los Angeles, California, on **June 2, 2004**

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

MARIZA VERGARA

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITIONER TAUNO WAIDLA'S INFORMAL REPLY BRIEF** uses 13 points Times New Roman Font and contains 3412 words.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: June 2, 2004

By_____
SEAN K. KENNEDY
Deputy Federal Public Defender